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STATE RESPONSIBILITY AND MARITIME TERRORISM IN THE STRAIT OF MALACCA: PERSUADING INDONESIA AND MALAYSIA TO TAKE ADDITIONAL STEPS TO SECURE THE STRAIT

Tammy M. Sittnick[†]

Abstract: The Strait of Malacca, located between Indonesia and Malaysia, and opening into the Pacific Ocean off the coast of Singapore, is not only one of the world's busiest and most vital waterways, but also a likely target for maritime terrorists. High levels of piracy and the presence of numerous regional terrorist organizations suggest the Strait is particularly vulnerable to a maritime terrorist attack. Such an attack would significantly disrupt international trade and could inflict billions of dollars in damage to the global economy.

Primary responsibility for the security of the Strait lies with the coastal states of Indonesia, Malaysia, and Singapore. Despite recent efforts by the coastal states to improve security in the Strait, sustained piracy rates indicate such efforts have had a limited effect. Although Singapore has expressed a willingness to consider additional steps, Malaysia and Indonesia have refused to take further steps to improve security, such as implementing joint patrols or allowing for the presence of extra-regional forces, arguing such steps infringe upon their sovereignty.

Current international piracy and maritime terrorism laws do not provide an effective mechanism for addressing the security threat in the Strait or for encouraging Malaysia and Indonesia to take additional available steps. Emerging international terrorism law, however, may impose liability on Malaysia and Indonesia for a maritime terrorist attack in the Strait unless they improve the security of this vital international shipping route.

I. INTRODUCTION

On a moonless night in March 2003, a dozen men dressed in black climbed aboard the Indonesia chemical tanker *Dewi Madrim* as it transited through the Strait of Malacca, the narrow waterway located between the coastal states of Indonesia, Malaysia, and Singapore.¹ After tying up the crew, the hijackers steered the vessel for an hour through the Strait before leaving with some of the ship's equipment and technical documents.² The attack on the *Dewi Madrim* in the Strait of Malacca is representative of the growing tide of crime that has turned one of the world's busiest waterways

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¹ Simon Elegant, *Dire Straits*, TIME ASIA, Dec. 6, 2004, at <http://www.time.com/time/asia/magazine/printout/0,13675,501041206-832306,00.html> (last visited May 31, 2005).

² *Id.*

into one of the most dangerous. Although nations have intensified land and air security against the threat of terrorism, record levels of piracy and the threat of maritime terrorism still jeopardize the safety of the world's waterways. Nowhere is maritime violence more problematic than in Southeast Asia, especially along the Strait of Malacca.³

Southeast Asia has the highest number of pirate attacks and incidents of maritime violence globally.⁴ Of these attacks, the greatest number occur within Indonesia's territorial sea.⁵ Far from being a relic of the past, modern pirates and sea robbers are highly sophisticated and pose a significant threat to ships and their crews.⁶ According to the International Maritime Bureau ("IMB"), pirate attacks are on the rise in the Strait of Malacca.⁷

As attacks on vessels increase in number and violence, security experts warn that terrorists may resort to pirate-style tactics, or work in concert with pirates, to perpetuate acts of maritime terrorism.⁸ Numerous militant Islamic organizations operate in Southeast Asia.⁹ Many of these organizations have ties to Al Qaeda, whose strategy is to attack "soft" economic targets.¹⁰ As one of the world's busiest shipping lanes and a natural "choke point," the Strait of Malacca is a logical "soft" economic

³ The term "Malacca Strait" refers to the waterway located between Indonesia and Malaysia emptying into the Strait of Singapore. Some commentators use the term Straits of Malacca to refer both to the Malacca and Singapore Straits. See MICHAEL LEIFER, INTERNATIONAL STRAITS OF THE WORLD: MALACCA, SINGAPORE, AND INDONESIA 54 (1978) (showing a map of the Malacca and Singapore Straits).

⁴ See INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY: JANUARY 1–DECEMBER 31, 2004: ATTACKS IN SE ASIA, INDIAN SUB. CONT., AND FAR EAST, at http://www.iccwbo.org/home/news_archives/2005/Images/Piracy_maps/Piracy_maps_2004.asp (last visited May 31, 2005) [hereinafter PIRACY MAPS].

⁵ Of the 325 reported attacks on merchant ships worldwide during 2004, ninety-three occurred in Indonesian waters. Press Release, International Maritime Bureau, Annual Death Toll from Piracy Rises (Feb. 7, 2005), at http://www.iccwbo.org/home/news_archives/2005/2004_piracy.asp (last visited May 31, 2005) [hereinafter IMB Press Release].

⁶ See Simon Montlake, *Pirates Ahead!*, CHRISTIAN SCI. MONITOR, Mar. 18, 2004, at 13.

⁷ IMB Press Release, *supra* note 5. During 2004, thirty-seven pirate or armed robbery attacks occurred in the Strait of Malacca. See PIRACY MAP, *supra* note 4.

⁸ Efthimios Mitropoulos, Secretary-General of the IMO, Address at the Fifth Regional Seapower Symposium for the Mediterranean and Black Sea Navies (Oct. 13, 2004), at http://www.imo.org/newsroom/mainframe.asp?topic_id=847&doc_id=4364 (last visited May 31, 2005).

⁹ MARK MANYIN ET AL., CONGRESSIONAL RESEARCH SERVICE, TERRORISM IN SOUTHEAST ASIA 2-4 (updated Aug. 13, 2004), at <http://fpc.state.gov/documents/organization/35795.pdf> (last visited May 31, 2005) [hereinafter CRS TERRORISM REPORT].

¹⁰ Ambassador Francis X. Taylor, Assistant Secretary for Diplomatic Security, Address before the Energy Security Council (Apr. 5, 2004), available at <http://www.state.gov/m/ds/rls/rm/31917.htm> (last visited May 31, 2005) (noting terrorists have shifted toward attacking soft targets, such as economic or capitalist targets such as the Bali night club) [hereinafter Taylor Speech].

target for those who wish to perpetrate a terrorist attack that would seriously harm the global economy.¹¹

The Strait of Malacca is located mostly within the territorial waters of Singapore, Malaysia, and Indonesia.¹² These states have primary responsibility for ensuring the safety of the Strait.¹³ Despite numerous unilateral, bilateral, and trilateral efforts by the three coastal states to improve maritime safety,¹⁴ piracy rates in the Strait of Malacca remain high.¹⁵ Current efforts are hindered by inadequate patrol arrangements, which do not allow for cross-border pursuit, and the coastal states' lack of sufficient resources.¹⁶ Of particular concern is Indonesia. Not only do most attacks occur within Indonesia's territorial waters, but Indonesia lacks the necessary resources to adequately patrol its waters.¹⁷ Despite offers by user nations, including Japan and the United States,¹⁸ Malaysia and Indonesia have refused to allow extra-regional patrols or cross-border patrols, claiming sovereignty concerns.¹⁹

Given the importance of the Strait to international shipping and the potential economic impact a maritime terrorist attack could have on the global economy, the question arises whether a legal regime exists that compels the coastal states to take additional steps to secure the Strait. This Comment argues that while current piracy laws do not provide an adequate mechanism for addressing the security concerns in the Strait of Malacca, emerging duties under international terrorism law may impose responsibility on Malaysia and Indonesia for a maritime terrorist attack unless they take additional available steps to ensure the safety of the Strait. Part II outlines the economic importance of the Strait and its vulnerability to a possible

¹¹ See Montlake, *supra* note 6; Efthimios Mitropoulos, Keynote Address at the IMO ASEAN Regional Forum Conference Regional Co-operation in Maritime Security (Mar. 4, 2005), at <http://www.mindef.gov.sg/display.asp?number=2383> (last visited May 31, 2005).

¹² See LEIFER, *supra* note 3, at 54.

¹³ See discussion *infra* Part III.A.

¹⁴ *Id.*

¹⁵ IMB Press Release, *supra* note 5 (reporting that hijackings of tugs and barges and the kidnapping of crew members were on the rise, especially in Indonesian waters, in the Northern Malacca Straits).

¹⁶ See discussion *infra* Part III.B.

¹⁷ *Id.*

¹⁸ For several years Japan has offered to assist with patrolling the Strait. See, e.g., *Forging a New Japan*, ASIA TIMES, Feb. 22, 2000, at <http://www.atimes.com/japan-econ/BB23Dh01.html> (last visited May 31, 2005) (discussing the possibility of Japan sending its Maritime Safety Agency to help patrol the Strait of Malacca). In March 2005, responding to a pirate attack on a Japanese tugboat in the Strait of Malacca, Japan once again proposed sending the Japanese Coast Guard to patrol the Strait. The coastal states, however, have rejected Japan's proposals. *Pirates Hijacked Our Boat to Attack Tug: Fisherman*, THE JAPAN TIMES, Mar. 19, 2005, at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20050319a6.htm> (last visited May 31, 2005). For discussion of a U.S. proposal see *infra* Part III.B.

¹⁹ See *infra* Part III.B.

maritime terrorist attack. Part III discusses the current efforts by the coastal states to improve security in the Strait and why sovereignty concerns have prevented Indonesia and Malaysia from taking additional steps. Part IV analyzes the adequacy of the international piracy regime in addressing the threat of maritime terrorism. Part V presents a case for potential state responsibility under emerging international terrorism law if additional actions are not taken by the coastal states. Finally, Part VI suggests supplemental steps the coastal states can take to avoid responsibility for a maritime terrorism attack in the Strait of Malacca.

II. THE STRAIT OF MALACCA IS PARTICULARLY VULNERABLE TO A MARITIME TERRORIST ATTACK DUE TO ITS ECONOMIC IMPORTANCE AND THE REGION'S SUSCEPTIBILITY TO TERRORISM AND PIRACY

The Strait of Malacca is the primary shipping passageway between the Indian and Pacific Oceans²⁰ and perhaps the world's busiest strait.²¹ Five hundred and twenty nautical miles in length and extremely narrow in places,²² the Strait of Malacca is transited by more than 50,000 vessels each year.²³ Any serious disruption to the flow of maritime traffic through the Strait due to a collision or sinking of a ship, for example, would have a "widespread and far-reaching detrimental effect,"²⁴ inflicting billions of dollars in damage to the world economy.²⁵

The narrowness and congestion of the Strait require transiting vessels to reduce speed, making them vulnerable to attacks. Consequently, the Strait of Malacca is considered one of the most dangerous areas in the world for ships.²⁶ Additionally, the presence of local radical Islamic groups in the

²⁰ BHABANI SEN GUPTA ET AL., *THE MALACCA STRAITS AND THE INDIAN OCEAN: A STUDY OF THE STRATEGIC AND LEGAL ASPECTS OF A CONTROVERSIAL SEA-LANE* 11 (1974).

²¹ Tamara Renee Shie, *Ports in a Storm?: The Nexus Between Counterterrorism, Counterproliferation, and Maritime Security in Southeast Asia*, 4 *ISSUES & INSIGHTS* 7 (Jul. 2004), at http://www.csis.org/pacfor/issues%5Cv04n04_pdf.pdf (last visited May 31, 2005).

²² The narrowest point within the Strait of Malacca is only 1.5 miles wide. See, e.g., U.S. ENERGY INFORMATION ADMINISTRATION, *WORLD OIL TRANSIT CHOKEPOINTS*, Apr. 2004, at <http://www.eia.doe.gov/cabs/choke.html#malacca> (last visited May 31, 2005) [hereinafter *WORLD OIL CHOKEPOINTS*] (noting the Phillips Channel is the narrowest point in the Strait).

²³ *Id.*

²⁴ Press Release, International Maritime Organization, *IMO to Take Straits Initiative* (Nov. 19, 2004), at http://www.imo.org/Newsroom/mainframe.asp?topic_id=114&doc_id=4467 (last visited May 31, 2005).

²⁵ Gal Luft & Anne Korin, *Terrorism Goes to Sea*, 83 *FOREIGN AFF.* 61, 64 (2004).

²⁶ *Id.* at 67.

region raises concerns about a nexus between piracy and terrorism.²⁷ Given the importance of the Strait of Malacca to the global economy, the navigational difficulties, and the threat posed by piracy and maritime terrorism, the security of the Strait is of imminent concern.

A. *The Strait of Malacca Is Vital to the Global Economy*

The Strait of Malacca has played an important role in global trade for centuries.²⁸ Early Indian, Chinese, Arab, and other international traders transited the Strait.²⁹ By the fifth century, the Strait of Malacca had attained international prominence.³⁰ Its strategic location has made it an object of international rivalry since the fifteenth century.³¹ The Portuguese, who arrived in Malaysia in the early sixteenth century,³² were superseded by the Dutch, who seized control of the Strait in 1642.³³ In the late eighteenth century, the British challenged Dutch prominence.³⁴ The Dutch-British rivalry ended in 1824 with the signing of an agreement in which Britain agreed to safeguard the Strait and keep it open to the Dutch and other friendly nations.³⁵

Today, the Strait of Malacca continues to be vital to international trade, especially energy trade.³⁶ Oil tanker traffic accounts for thirty to forty percent of all transit shipping passing through the Straits of Malacca and Singapore.³⁷ More than eighty percent of the oil imported by Japan, South Korea, and China comes from the Persian Gulf via the Strait of Malacca.³⁸ With Chinese oil imports from the Middle East increasing steadily, the Strait of Malacca is likely to grow in strategic importance in coming years.³⁹

²⁷ Shie, *supra* note 21, at 13; Andrew Holt, *Plugging the Holes in Maritime Security*, THE JAMESTOWN FOUNDATION, May 6, 2004, at http://www.jamestown.org/publications_details.php?volume_id=400&issue_id=2945&article_id=236670 (last visited May 31, 2005).

²⁸ DONALD B. FREEMAN, *THE STRAITS OF MALACCA: GATEWAY OR GAUNTLET?* 69 (2004).

²⁹ *Id.* at 81.

³⁰ LEIFER, *supra* note 3, at 6.

³¹ SEN GUPTA, *supra* note 20, at 13.

³² *Id.*

³³ LEIFER, *supra* note 3, at 8.

³⁴ SEN GUPTA, *supra* note 20, at 13.

³⁵ *Id.* at 13-14.

³⁶ See WORLD OIL CHOKEPOINTS, *supra* note 22; Luft & Korin, *supra* note 25, at 61-62.

³⁷ FREEMAN, *supra* note 28, at 114.

³⁸ Michael Richardson, *Terrorism: The Maritime Dimension*, 3 TRENDS IN SOUTHEAST ASIA SERIES 1, 7, available at <http://www.iseas.edu.sg/32004.pdf> (last visited May 31, 2005).

³⁹ See WORLD OIL CHOKEPOINTS, *supra* note 22.

Closure of the Strait in the event of a terrorist attack would, therefore, have a serious effect on the world's energy markets.⁴⁰

B. The Prevalence of Terrorist Organizations in Southeast Asia and Their Strategy of Attacking "Soft" Economic Targets Make the Strait of Malacca a Logical Terrorist Target

Terrorism has been a major problem for many Southeast Asian countries for decades.⁴¹ Because of its political instability and numerous Muslim separatist groups, Southeast Asia has been considered the "second front" in the U.S. global campaign against terrorism.⁴² For many years, militant Islamic groups, including Jemaah Islamiyya ("JI"),⁴³ Moro Islamic Liberation Front ("MILF"),⁴⁴ and Abu Sayyaf ("ASG"),⁴⁵ carried out terrorist attacks against their governments as part of Islamic separatist movements.⁴⁶ Although once considered merely a regional threat, recent revelations have exposed links between some of these regional groups and Al Qaeda.⁴⁷

⁴⁰ See, e.g., Luft & Korin, *supra* note 25, at 65-7; *Perils on the Sea*, THE ECONOMIST, June 30, 2004, 37 (observing the cost of a terrorist attack that succeeds in disrupting world trade—especially in oil—could be colossal).

⁴¹ CRS TERRORISM REPORT, *supra* note 9, at 2.

⁴² *Id.* at 1.

⁴³ Jemaah Islamiyah ("JI") is a militant Islamist group active in several Southeast Asian countries, especially Indonesia. Founded in the 1960s by Abu Bakar Baasyir and Abdullah Sungkar, JI's stated goal is to create an Islamic state comprising Malaysia, Singapore, Indonesia, and the southern Philippines. Initially it was thought to be the Southeast Asian affiliate of Al Qaeda. There is increasing evidence, however, that while the two groups have a symbiotic relationship, they are discrete organizations with differing, albeit overlapping agendas. See generally CRS TERRORISM REPORT, *supra* note 9, at 4-12 (describing the threat posed by Jemaah Islamiyah).

⁴⁴ Moro Islamic Liberation Front ("MILF") operates primarily in the southern Philippines. The main political objective of MILF has been separation and independence for the Muslim region of the southern Philippines. MILF was linked to the February 24, 2000, explosion of two buses aboard a ferry in the Philippines, which killed at least forty-five passengers and injured many others. It is suspected that JI terrorists have trained at MILF camps in the Philippines. CRS TERRORISM REPORT, *supra* note 9, at 18.

⁴⁵ Abu Sayyaf ("ASG"), which operates in the Philippines, emerged in 1990 as a splinter group composed of former Moro National Liberation Front fighters and Filipinos who had fought against the Soviets in Afghanistan. ASG is responsible for numerous attacks against Filipino and American targets, including the February 2004 bombing of Super Ferry 14, a Philippine passenger ship, which killed 100 people, the May 2000 kidnapping of three Americans, two of whom were killed, and an October 2002 explosion, which killed a U.S. soldier in Mindanao. See generally LARRY NIKSCH, CONGRESSIONAL RESEARCH SERVICE, ABU SAYYAF: TARGET OF PHILIPPINE-U.S. ANTI-TERRORISM COOPERATION (Jan. 25, 2002) at <http://fpc.state.gov/documents/organization/8046.pdf> (last visited May 31, 2005) (providing a summary of Abu Sayyaf) [hereinafter CRS ABU SAYYAF REPORT].

⁴⁶ See generally CRS TERRORISM REPORT, *supra* note 9; CRS ABU SAYYAF REPORT, *supra* note 45 (discussing terrorism in Southeast Asia).

⁴⁷ Al Qaeda, Arabic for "the base," is an international terrorist organization led by Osama bin Laden. Al Qaeda is responsible for numerous terrorist attacks including the September 11, 2001, attacks on New York City and Washington, D.C., the October 2000 U.S.S. *Cole* bombing, and the August 1998 bombings

Since nations have strengthened security at political, diplomatic, and military facilities, terrorists have turned toward attacking "soft" economic targets.⁴⁸ The JI bombings of a Bali nightclub in October 2002⁴⁹ and an Indonesian JW Marriot hotel in August 2003⁵⁰ indicate that Southeast Asian groups have also adopted this strategy.⁵¹ Maritime targets, including shipping channels such as the Strait of Malacca, appear to be logical economic targets.⁵² One analyst warned: "Al Qaeda and its affiliates plan strategically and over a very long time. They have done the aviation spectacular in New York. They have done the trains spectacular in Madrid. Will they do the maritime spectacular in Southeast Asia?"⁵³

C. Many Possible Maritime Terrorism Scenarios Exist

Several possible maritime terrorist scenarios exist. As the 1985 hijacking of the Italian cruise ship *Achille Lauro*⁵⁴ and the recent attack on a Philippine ferry⁵⁵ indicate, passenger ships, especially ferries and cruise ships, are vulnerable targets. Such ships could either be blown up or used as weapons against other ships or a seaport.⁵⁶ Either scenario would likely result in a large number of civilian casualties. Other possible attacks include the use of shipping containers to smuggle weapons of mass destruction into

of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. See generally AUDREY KURTH CRONIN, CONGRESSIONAL RESEARCH SERVICE, *AL QAEDA AFTER THE IRAQ CONFLICT* (May 23, 2003), <http://www.fas.org/irp/crs/RS21529.pdf> (last visited May 31, 2005) (summarizing terrorist actions taken by Al Qaeda).

⁴⁸ Taylor Speech, *supra* note 10.

⁴⁹ The Bali terrorist bombing occurred on October 12, 2002, in the town of Kuta on the Indonesian island of Bali. The blast killed 202 people and injured 209, most of whom were foreign tourists. It is considered the deadliest act of terrorism in Indonesian history. The bombing is sometimes referred to as "Australia's 9-11" because Australia suffered the largest number of casualties in the bombing. CRS TERRORISM REPORT, *supra* note 9, at 10.

⁵⁰ On August 5, 2003, a car bomb exploded outside the J.W. Marriott in Jakarta killing twelve people and injuring over 150. See, e.g., Dan Murphy, *Indonesia Car Bomb Echoes Bali*, CHRISTIAN SCI. MONITOR, 1, Aug. 6, 2003 (describing the Bali bombing).

⁵¹ Taylor Speech, *supra* note 10.

⁵² See, e.g., Montlake, *supra* note 6; Rear-Admiral Teo Chee Hean, Address at the opening of the 2nd Western Pacific MCMEX and DIVEX (Apr. 26, 2004), at <http://www.mindef.gov.sg/display.asp?number=2073> (last visited May 31, 2005) (discussing threat to economic targets).

⁵³ Greg Sheridan, *Muslim Deaths Hit Region's War on Terror*, THE AUSTRALIAN, Nov. 1, 2004, at C24.

⁵⁴ *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2nd Cir. 1991) (summarizing the basic facts of the incident).

⁵⁵ See *Bomb Caused Philippine Ferry Fire*, BBC NEWS, Oct. 11, 2004, at <http://news.bbc.co.uk/2/hi/asia-pacific/3732356.stm> (last visited May 31, 2005).

⁵⁶ *Minister Warns Pirate Attacks Might be Linked to Terror Groups*, AGENCE FR. PRESSE, Mar. 2, 2004, (quoting Tony Tan, Singapore's Deputy Prime Minister and Coordinating Minister for Security and Defense as saying, "The threat of a commercial vessel or cruise liner being hijacked and used as a floating bomb against Singapore is a very serious one").

a country and the use of a ship to launch an attack on a port city.⁵⁷ Additionally, attacks similar to those perpetrated against the U.S.S. *Cole*⁵⁸ or the French supertanker *Limburg*⁵⁹ remain possible.

Another serious concern is the maritime equivalent of the September 11th attacks.⁶⁰ If terrorists hijacked a ship, especially one carrying flammable materials such as oil or liquefied natural gas, they would have the potential to blow the ship up at one of the narrow points in the Strait of Malacca, or ram the ship into another ship or port. The September 1992 collision in the Strait of Malacca between the tanker *Nagasaki Spirit* and the container ship *Ocean Blessing* illustrates how easily terrorists could conduct a similar, but more disastrous operation.⁶¹

The Strait of Malacca is a vital shipping passageway, essential to the world economy and energy markets. Already a hotbed for piracy and home to numerous militant Islamic groups, the Strait of Malacca is a logical target for a maritime terrorist attack aimed at disrupting the global economy. Not only would a maritime attack result in the loss of life, but it could significantly disrupt global shipping and have a tremendous impact on the global markets.

⁵⁷ The Container Security Initiative ("CSI") is a U.S. Customs and Border Protection ("U.S. Customs") project designed to improve port security by preventing the smuggling of terrorist weapons in ocean-going cargo containers. Under the CSI, the U.S. Customs enters into bilateral agreements with foreign governments in order to identify potentially dangerous or suspicious cargo, increase sensors on containers, and develop secure containers. Screening is done overseas before the cargo reaches U.S. ports. As of November 12, 2004, thirty-two ports were operational under the CSI. The International Ship and Port Facility Security Code, promoted by the UN's International Maritime Organization, went into effect July 1, 2004; See U.S. CUSTOMS & BORDER PROTECTION, CSI IN BRIEF, at http://www.customs.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml (last visited May 31, 2005); see generally Jessica Romero, Comment, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHI. J. INT'L L. 597 (2003) (providing an overview of the CSI).

⁵⁸ On October 12, 2000, while refueling at a Yemeni's port, an apparent suicide attack against the 505-foot destroyer created a forty-foot by forty-foot hole in the ship's hull, killing seventeen U.S. sailors and injuring thirty-nine. See generally RAPHAEL PERL & RONALD O'ROURKE, CONGRESSIONAL RESEARCH SERVICE, TERRORIST ATTACK ON USS COLE: BACKGROUND AND ISSUES FOR CONGRESS (2001) at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/crs20010130.pdf> (last visited May 31, 2005) (providing background on the terrorist attack on the U.S.S. *Cole*).

⁵⁹ The *Limburg* was a French tanker carrying more than 397,000 barrels of crude oil that was blown up by a small boat, much like the way the U.S.S. *Cole* was attacked. See, e.g., *France Says Tanker was Attacked*, BBC NEWS, Oct. 10, 2002, http://news.bbc.co.uk/1/hi/world/middle_east/2318031.stm (last visited May 31, 2005) (summarizing and comparing the attacks and providing details on the *Limburg* attack).

⁶⁰ H.E. Jose Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. OF MARINE AND COASTAL L. 363, 389 (2003).

⁶¹ It is suspected that pirates were aboard at least one, if not both, of the vessels. The collision resulted in a 40,000 ton crude oil spill. See JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS 134-48 (2003) (discussing the collision and efforts to salvage the vessels).

D. The Piracy-Terrorism Nexus Increases the Likelihood of a Maritime Terrorist Attack

The prevalence of piracy in the Strait of Malacca suggests that a maritime terrorist attack could easily be perpetrated.⁶² In 2004 there were 325 reported attacks on vessels worldwide.⁶³ Of those, ninety-three occurred in Southeast Asian waters and thirty-seven occurred within the Strait itself.⁶⁴ Because these attacks occurred in areas where Islamic militant groups such as JI and ASG operate, it is easy to see why elevated piracy rates demonstrate vulnerability.⁶⁵

The possible nexus between piracy and terrorism is bolstered further by reports of terrorists posing as pirates and hijacking ships for the purpose of training for a maritime strike.⁶⁶ Although there has yet to be a successful terrorist attack on a major shipping facility or shipping passageway, this may be because terrorists do not yet have the necessary maritime craft and seafaring skills.⁶⁷ Incidents such as the hijacking of the *Dewi Madrim*, however, suggest that terrorists are attempting to gain the requisite skills for such an attack.⁶⁸ According to Indonesia's state intelligence agency, detained senior JI members admitted that the group has considered launching attacks on ships in the Strait of Malacca.⁶⁹

Indeed, piracy and terrorism are similar in several ways, particularly in the tactics of ship seizures and hijackings.⁷⁰ Nonetheless, piracy and terrorism are not interchangeable phenomena.⁷¹ Piracy is primarily motivated by private gains, while terrorism is motivated by political objectives.⁷² That is, while terrorists want to draw attention to their acts by causing as much harm as possible, pirates seek to minimize attention and unnecessary damage.⁷³ Further, as discussed in Part IV, under international

⁶² Shie, *supra* note 21, at 13.

⁶³ IMB Press Release, *supra* note 5.

⁶⁴ See PIRACY MAPS, *supra* note 4.

⁶⁵ Shie, *supra* note 21, at 13.

⁶⁶ *Id.*; *Perils on the Sea*, *supra* note 40.

⁶⁷ GRAHAM GERARD ONG, INSTITUTE OF SOUTH EAST ASIAN STUDIES, PRE-EMPTING MARITIME TERRORISM IN SOUTHEAST ASIA, 2 (Nov. 29, 2002), available at <http://www.iseas.edu.sg/viewpoint/ggonov02.pdf> (last visited May 31, 2005) (on file with the Journal).

⁶⁸ Elegant, *supra* note 1.

⁶⁹ Luft & Korin, *supra* note 25, at 63.

⁷⁰ See Adam Young & Mark J. Valencia, *Piracy, Terrorism Threats Overlap*, WASH. TIMES, July 7, 2003, at A18.

⁷¹ Shie, *supra* note 21, at 13.

⁷² See *infra* note 118 and accompanying text (piracy is an act committed for private ends); *infra* note 128 and accompanying text (U.N. Report proposed definition of terrorism involves political motivation).

⁷³ Young & Valencia, *supra* note 70.

law the two crimes are identified and addressed differently.⁷⁴ Although piracy and terrorism are distinct crimes, the prevalence of piracy and armed robbery in the Strait of Malacca exposes a security gap that terrorists could exploit.⁷⁵ Therefore, if the coastal states seek to minimize the risk of maritime terrorism in the Strait, they can either reduce the threat of terrorism directly, or reduce factors that allow for piracy, and in doing so collaterally reduce the threat of terrorism. As discussed below, Indonesia and Malaysia have not taken all available steps to either reduce the threat of terrorism directly, or sufficiently increase domestic police activities to reduce piracy, which would have the collateral effect of reducing terrorism.

III. ALTHOUGH CURRENT EFFORTS BY THE COASTAL STATES HAVE FAILED TO SECURE THE STRAIT, MALAYSIA AND INDONESIA HAVE REFUSED TO TAKE FURTHER STEPS TO IMPROVE SECURITY

Responsibility for the security and safety of the Strait of Malacca rests primarily with the coastal states.⁷⁶ Although the coastal states have undertaken various unilateral, bilateral⁷⁷ and, recently, trilateral arrangements⁷⁸ in an effort to address safety and security concerns within the Strait of Malacca, continued maritime violence rates indicate that such agreements have had only a limited effect.⁷⁹ The effectiveness of these arrangements is limited primarily by regional sensitivity over territorial sovereignty.⁸⁰ Such concerns, espoused primarily by Indonesia and Malaysia, have prevented the coastal states from engaging in joint patrols, which would allow them to enter into each other's territorial seas without first seeking that state's permission, and from allowing extra-regional forces into the Strait.⁸¹

⁷⁴ See *infra* Part IV.A-B.

⁷⁵ Shie, *supra* note 21, at 13.

⁷⁶ United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 2, 24, 34(1), 1833 U.N.T.S. 397 [hereinafter UNCLOS] (stating that "[t]he regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil").

⁷⁷ Peter Chalk, *Contemporary Maritime Piracy in Southeast Asia*, 101 MARINE STUD. 8-10 (1998).

⁷⁸ See *infra* Part III.A.

⁷⁹ IMB Press Release, *supra* note 5 (although global rates of piracy decreased in 2004, reported incidents were on the rise in the Strait of Malacca).

⁸⁰ Chalk, *supra* note 77, at 9; See *infra* Part III.B.

⁸¹ See discussion *infra* Part III.B.

A. *Efforts by the Coastal States Have Failed to Secure the Strait*

Singapore, Malaysia, and Indonesia have taken various unilateral and bilateral steps meant to ensure maritime safety in the Strait.⁸² Beginning in 1991 Singapore increased coastal patrols and allocated greater resources for improving surveillance.⁸³ Similarly, Malaysia increased patrols of its coasts through the use of anti-piracy commando units and a special marine police force.⁸⁴ In response to pressure from Malaysia and Singapore, Indonesia also increased maritime patrols.⁸⁵ During 1992, in response to a large number of maritime attacks on vessels in the Malacca and Singapore Straits, the coastal states expanded efforts to include bilateral initiatives.⁸⁶ Although these coordinated efforts reduced piracy initially,⁸⁷ by 1995 maritime violence rates once again increased.⁸⁸

In 2004, shortly after the United States proposed sending Marines to patrol the Strait,⁸⁹ Indonesia, Malaysia, and Singapore agreed to coordinate trilateral patrols of the region.⁹⁰ The trilateral patrols, code named MALSINDO, have been underway since July 2004.⁹¹ MALSINDO involves coordinated patrols in which the maritime security forces from the three coastal countries patrol within their own territorial waters.⁹² Despite these trilateral patrol efforts, piracy rates in the Strait of Malacca remain among the highest in the world.⁹³

Lack of both adequate patrol arrangements and sufficient resources have limited the effectiveness of the coastal states' efforts. Lack of resources is particularly problematic for Indonesia, whose navy and

⁸² Chalk, *supra* note 77, at 8-9.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 9.

⁸⁷ *Id.*

⁸⁸ Dana Dillon & Lucia Selvaggi, *Stopping an Al Qaeda Attack in the Malacca Straits*, THE HERITAGE FOUNDATION, Jan. 28, 2004, at <http://www.heritage.org/Press/Commentary/ed120203a.cfm> (last visited May 31, 2005).

⁸⁹ See *infra* Part III.B.

⁹⁰ See *S'pore, Malaysia, Indonesia Start Coordinated Malacca Straits Patrols*, CHANNEL NEWSASIA, July 20, 2004, at <http://www.channelnewsasia.com/stories/southeastasia/view/96556/1/.html> (last visited May 31, 2005) (on file with the Journal) [hereinafter *Coordinated Patrols*].

⁹¹ Press Release, MINDEF, Launch of Coordinated Patrols—MALSINDO—Malacca Straits Coordinated Patrol (July 20, 2004), at <http://www.mindef.gov.sg/display.asp?number=2170> (last visited May 31, 2005).

⁹² Alastair Wanklyn, *Singapore, Malaysia and Indonesia Making Right Moves Against Piracy: Think Tank*, CHANNEL NEWSASIA, Oct. 20 2004, at <http://www.channelnewsasia.com/stories/singaporelocalnews/view/112596/1/.html> (last visited May 31, 2005) (on file with the Journal).

⁹³ IMB Press Release, *supra* note 5 (reporting that although global rates of piracy decreased in 2004, reported incidents were on the rise in the Strait of Malacca).

maritime police remain weak and under-budgeted.⁹⁴ Reports suggest that only thirty percent of Indonesia's navy, which is comprised of fourteen warships and fifty-seven patrol boats plus a fleet of support vessels, is seaworthy.⁹⁵ Such a limited capacity provides an invitation to piracy on the Indonesian side of the Strait. This lack of resources is further exacerbated by the recent tsunami that struck Indonesia on December 26, 2004.⁹⁶ Given the enormous damage caused to Indonesia by this natural disaster, it is likely that the government is not in a position to contribute significant resources to improve its maritime security capabilities.

B. Malaysia and Indonesia Have Rejected Options That Would Improve Security in the Strait, Claiming Such Steps Infringe Upon Their Sovereignty

Even though options for strengthening security efforts in the Strait of Malacca exist, the coastal states, particularly Malaysia and Indonesia, have rejected extending current efforts, claiming sovereignty concerns.⁹⁷ The current coordinated patrol efforts were initially conceived as joint patrols, which would have allowed for vessel sharing and cross-border agreements.⁹⁸ However, after initially agreeing to joint patrols, Malaysian and Indonesian officials reconsidered and approved coordinated patrols only.⁹⁹ Malaysia's Deputy Prime Minister Najib Razak explained: "We have to respect the cardinal principle of national sovereignty."¹⁰⁰

Similarly, Malaysia and Indonesia rejected the possibility of extra-regional patrols of the Strait. During his March 31, 2004, testimony before the House Armed Services Committee, Admiral Thomas Fargo, Commander of the U.S. Pacific Command, suggested the possibility of a U.S.-led Regional Maritime Security Initiative ("RMSI") to improve security in the

⁹⁴ *Id.*

⁹⁵ INSTITUTE FOR THE ANALYSIS OF GLOBAL SECURITY, CHILLY RESPONSE TO U.S. PLAN TO DEPLOY FORCES IN THE STRAIT OF MALACCA, May 24, 2003, at <http://www.iags.org/n0524042.htm> (last visited May 31, 2005).

⁹⁶ The tsunami struck Indonesia's Aceh Province, killing thousands of people and inflicting tremendous damage. As of April 2005, the number of dead or missing in Indonesia was estimated to be over 160,000. *Indonesia Trims by 60% Number of Missing From Tsunami Disaster*, BLOOMBERG NEWS, Apr. 7, 2005, available at <http://www.bloomberg.com/apps/news?pid=10000080&sid=a8x5LqH58DOM&refer=asia> (last visited May 31, 2005).

⁹⁷ *See infra* Part III.B.

⁹⁸ *Coordinated Patrols*, *supra* note 90.

⁹⁹ *Malaysia, Indonesia Rule Out Joint Patrols in Malacca Straits*, CHANNEL NEWSASIA, July 1, 2004, at <http://www.channelnewsasia.com/stories/southeastasia/view/93163/1/.html> (last visited May 31, 2005) (on file with the Journal).

¹⁰⁰ *Id.*

Strait of Malacca.¹⁰¹ The stated common goal of the RMSI is to develop a partnership of willing nations to enhance capabilities and leverage capacities through unity of effort to identify, monitor, and intercept transnational maritime threats consistent with existing international and domestic laws.¹⁰² In his testimony, Fargo indicated that such an initiative could involve potentially putting "Marines on high speed vessels so that we can use boats that might be incorporated with these vessels to conduct effective interdiction."¹⁰³

While Singapore favored U.S. military presence in the region, Malaysia and Indonesia responded negatively, characterizing the RMSI as a threat to their national sovereignty.¹⁰⁴ Deputy Prime Minister Razak said "control of the Strait is the sovereign prerogative of Malaysia and Indonesia, and U.S. military involvement is not welcome."¹⁰⁵ Indonesia asserted that the waters of the Strait of Malacca are part of the territorial waters of the coastal states over which they have sovereignty, and the security of the Strait is the responsibility of the coastal states.¹⁰⁶ Malaysia and Indonesia also insisted that they have the capability to ensure the Strait's security.¹⁰⁷

Despite efforts by the coastal states to improve security within the Strait of Malacca, sustained piracy rates indicate that such efforts have yielded limited success. Although options exist for improving security in the Strait, Malaysia and Indonesia have been unwilling to allow either cross-border agreements or extra-regional patrols. Instead, Malaysia and Indonesia argue that those measures are incompatible with the principles of state sovereignty. As discussed below, the current international piracy regime does not provide a mechanism to effectively address the security

¹⁰¹ *Regarding U.S. Pacific Command Posture: Hearing on the Fiscal Year 2005 National Defense Authorization budget request from the Department of Defense before the House Armed Services Comm.*, 108th Cong. 46 (2004) (statement of Adm. Thomas B. Fargo, U.S. Navy Commander, U.S. Pacific Command).

¹⁰² For a summary of the RMSI see JOINT INTERAGENCY COORDINATION GROUP FOR COMBATING TERRORISM, COMMANDER, UNITED STATES NAVY PACIFIC COMMAND, STRATEGY FOR REGIONAL MARITIME SECURITY (2004), available at <http://www.pacom.mil/rmsi/RMSI%20Strategy%20Nov%2004.pdf> (last visited May 31, 2005).

¹⁰³ *Regarding U.S. Pacific Command Posture: Hearing on the Fiscal Year 2005 National Defense Authorization budget request from the Department of Defense before the House Armed Services Comm.*, 108th Cong. 46 (2004) (transcript of Adm. Thomas B. Fargo, U.S. Navy Commander, U.S. Pacific Command).

¹⁰⁴ *Id.*

¹⁰⁵ Ji Guoxing, *U.S. RMSI Contravenes UN Convention on the Law of the Sea*, 29 PACNET, July 8, 2004, at <http://www.csis.org/pacfor/pac0429.pdf> (last visited May 7, 2005).

¹⁰⁶ Nugroho Wisnumurti, Former Director General for Political Affairs, Indonesia's Ministry of Foreign Affairs, Editorial, *Upholding Security in the Malacca Straits*, THE JAKARTA POST, Apr. 12, 2004, at <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20040412.F03> (last visited May 31, 2005) (articulating the Indonesian position on the proposed deployment of U.S. forces).

¹⁰⁷ *Malaysia, Indonesia Rule Out Joint Patrols in Malacca Straits*, *supra* note 99.

concerns in the Strait, nor does it provide a mechanism to overcome Malaysia's and Indonesia's sovereignty concerns. Emerging international terrorism law, however, which imposes a duty on states to prevent terrorism, provides an argument that unless Indonesia and Malaysia take the steps available for securing the Strait, they will bear responsibility for any such attack.

IV. CURRENT INTERNATIONAL PIRACY AND MARITIME TERRORISM LAWS INADEQUATELY ADDRESS THE TERRORISM THREATS IN THE MALACCA STRAIT

Although the security threat posed by maritime terrorism in the Strait of Malacca is widely recognized, current international piracy and maritime terrorism regimes are weak tools for preventing and suppressing such attacks.¹⁰⁸ The traditional definition of piracy, according to the United Nations Convention on the Law of the Sea ("UNCLOS"), addresses violence only on the high seas. Much of the Strait of Malacca, however, is located within the territorial seas of Indonesia, Malaysia, or Singapore.¹⁰⁹ Therefore, the piracy laws in the UNCLOS do not apply to much of the Strait of Malacca.¹¹⁰ Other definitional requirements in the UNCLOS preclude the applicability of piracy laws to acts of maritime terrorism.¹¹¹ Furthermore, despite the international community's attempt to respond to the threat of maritime terrorism with the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"),¹¹² the SUA Convention is presently inapplicable to the Strait of Malacca because not all of the coastal countries are parties.¹¹³ Even if Malaysia and Indonesia became parties, the SUA Convention provides

¹⁰⁸ Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 22 OCEAN DEV. & INT'L L. 317, 328 (1997).

¹⁰⁹ MICHAEL LEIFER, *supra* note 3, at 54.

¹¹⁰ At its western entrance, the Strait of Malacca is spacious and the coasts of Indonesia and Malaysia are separated by about 200 miles of water. The Strait, however, begins to take on the shape of a funnel as vessels proceed through it in a southeasterly direction. By the time a line of latitude is reached just South of 3°N and just below One Fathom Bank, the territorial waters of Indonesia and Malaysia begin to overlap. The narrowest breadth between opposite shores of the Strait of Malacca—at the south-western tip of the Malay Peninsula—is 8.4 nautical miles, though the navigable channel for deep draught vessels is much narrower. *Id.* at 53.

¹¹¹ See *infra* Part IV.A.

¹¹² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222, reprinted in 27 I.L.M. 668 [hereinafter SUA Convention].

¹¹³ IMO, STATUS OF CONVENTION BY COUNTRY, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11596/status.xls (last visited May 31, 2005) [hereinafter CONVENTION STATUS].

inadequate preventative measures and thus does little to reduce the threat of maritime terrorism.¹¹⁴

A. *The 1982 United Nations Convention on the Law of the Sea Does Not Provide an Adequate Mechanism for Addressing Maritime Terrorism in the Strait*

The definitional requirements for piracy in the UNCLOS preclude its application to maritime terrorism in the Strait of Malacca. Article 101 of the UNCLOS defines piracy under international law.¹¹⁵ It is generally accepted that this definition of piracy reflects long-standing customary international law.¹¹⁶ Subject to certain restrictions, any state can exercise jurisdiction over a ship suspected of piracy on the high seas.¹¹⁷ According to the UNCLOS, piracy consists of any of the following:

(a) any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, person or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b) of this article.¹¹⁸

The piracy provisions of the UNCLOS apply to any area beyond the territorial sea of a state.¹¹⁹ The UNCLOS recognizes three major

¹¹⁴ See *infra* Part IV.B.

¹¹⁵ UNCLOS, *supra* note 76, art. 101. This definition, however, does not necessarily reflect municipal piracy laws. *Id.*

¹¹⁶ Customary international law is binding on states although it is not written, but rather adhered to out of sense of legal obligation. When enough states have begun to behave as though something is law, it becomes law "by use." NATALINO RONZITTI, *The Law of the Sea and the Use of Force Against Terrorist Activities*, in *MARITIME TERRORISM AND INTERNATIONAL LAW 2* (Natalino Ronzitti ed., 1990).

¹¹⁷ UNCLOS, *supra* note 76, art. 105 (stating that "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board").

¹¹⁸ *Id.* art. 101.

¹¹⁹ *Id.* art. 58.

jurisdictional zones: territorial waters of a state, the exclusive economic zone ("EEZ"), and the high seas.¹²⁰ Under the UNCLOS, a state's territorial sea may extend up to twelve nautical miles from its baseline.¹²¹ Subject to the right of innocent passage through the territorial sea and to transit passage rights through straits and archipelagic waters, the coastal state has the same sovereignty over its territorial sea as it has with respect to its land territory.¹²² A state can also claim up to 200 miles from its coastlines as part of its EEZ.¹²³ Within its EEZ, a state has sovereign rights to exclusively exploit the marine resources.¹²⁴ Article 58 provides that the UNCLOS piracy provisions apply to the EEZ as well as the high seas.¹²⁵ Much of the Strait of Malacca, however, is located within the territorial waters of Malaysia, Indonesia, or Singapore.¹²⁶

The above mentioned definition's requirements of piracy *jure gentium*¹²⁷ also prevents maritime terrorism from being included within the ambit of international piracy laws because acts of terrorism are committed for public political ends.¹²⁸ Thus, in addition to its failure to satisfy the high seas requirement, acts of maritime terrorism in the Strait of Malacca fail to meet the private ends requirement.¹²⁹ Furthermore, the UNCLOS definition of piracy includes a "two-ship requirement" that the illegal act be committed by one ship against another ship.¹³⁰ This requirement precludes numerous maritime terrorist acts from being classified as piracy, including a "maritime

¹²⁰ *Id.* arts. 2, 33, 55, 86 (providing the structure of the jurisdictional scheme of the UNCLOS).

¹²¹ *Id.* art. 3 (stating that "[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention").

¹²² *Id.* arts. 2, 17 (allowing states to claim coastal waters as territorial waters and providing innocent passage rights). Innocent passage through a state's territorial seas is a limited right. Article 19 lists prohibited activities of a foreign state's ship. *Id.* art. 19.

¹²³ *Id.* arts. 3, 33, 57 (establishing geographical limits of each zone of jurisdiction on the seas).

¹²⁴ *Id.* art. 56 (stating that states only have a right to exploit marine resources in exclusive economic zones).

¹²⁵ *Id.* art. 58.

¹²⁶ See MICHAEL LEIFER, *supra* note 3, at 53-54.

¹²⁷ *Jure gentium* translates to "by the law of nations." BLACK'S LAW DICTIONARY 854 (7th ed. 1999).

¹²⁸ The 2004 United Nations Report of the Secretary General's High-level Panel on Threat, Challenges, and Change describes terrorism as "any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." U.N. GAOR, 59th Sess., at 48-9, U.N. Doc. A/59/565 (2004).

¹²⁹ UNCLOS, *supra* note 76, art. 101(a).

¹³⁰ The one-ship/two-ship requirement has been subject to some debate. See Samuel Pyeatt Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 141-47 (1990) (commenting on the "private ends" controversy and the "one ship/two ship" controversy stemming from the definition of piracy in UNCLOS).

9/11" situation where passengers or crew already aboard a vessel hijack the ship and use it as a weapon against a port facility.¹³¹ Thus, the UNCLOS definition of piracy is insufficient to deal with the maritime terrorism threat facing ships transiting the Strait of Malacca.

B. In Addition to the Failure of International Piracy Laws to Provide a Mechanism to Address Maritime Terrorism in the Strait, the SUA Convention Is Also Inadequate

In response to the 1985 hijacking of the passenger vessel *Achille Lauro* by members of the Palestinian Liberation Front,¹³² Italy, supported by Austria and Egypt, proposed a convention to address maritime terrorism.¹³³ The resulting SUA Convention was completed in Rome on March 10, 1988, and entered into force on March 1, 1992.¹³⁴ The SUA Convention closely parallels the language of other multilateral terrorism conventions such as those created to combat unlawful acts against the safety of air navigation,¹³⁵ internationally protected persons,¹³⁶ and the taking of hostages.¹³⁷ Article 3(1), which sets forth the offenses covered by the SUA Convention, states:

Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

¹³¹ Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 379 (2002).

¹³² On October 7, 1985, the *Achille Lauro*, an Italian-flag cruise ship was hijacked by members of the Palestinian Liberation Front, who had boarded the ship by posing as tourists. They took the ship's crew and passengers hostage and demanded that Israel release fifty Palestinian prisoners. When their demands were not met, the hijackers shot Leon Klinghoffer, a Jewish American who was paralyzed and in a wheelchair, and threw his body overboard. See *Klinghoffer*, *supra* note 54 (summarizing the basic facts of the incident).

¹³³ For general information on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation see Tullio Treves, *The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, *supra* note 116, at 69.

¹³⁴ SUA Convention, *supra* note 112.

¹³⁵ The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

¹³⁶ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975.

¹³⁷ Convention Against the Taking of Hostages, Dec. 17, 1979, *reprinted in* 18 ILM 1456 (1979).

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).¹³⁸

Each State Party is obligated to prosecute or extradite individuals suspected of the included offenses.¹³⁹ Unlike the UNCLOS definition of piracy,¹⁴⁰ the SUA Convention does not contain the private ends or two-ship requirements, nor does it include the requirement that an act occur on the high seas.¹⁴¹

Despite elimination of the private ends, two-ship, and territorial requirements, the SUA Convention does not sufficiently address the threat of maritime terrorism, particularly within the Strait of Malacca. First, the SUA Convention only imposes obligations on State Parties.¹⁴² Although Singapore is a party to the SUA Convention, neither Indonesia nor Malaysia has ratified it.¹⁴³ Therefore, neither is obligated to fulfill its requirements.

Even if all three coastal states became parties, the SUA Convention's reactive, not proactive, nature would still make it an insufficient means of preventing terrorism. The primary function of the SUA Convention is not

¹³⁸ SUA Convention, *supra* note 112, art. 3(1).

¹³⁹ *Id.* art. 10(1).

¹⁴⁰ UNCLOS, *supra* note 76, art. 101(a)(i).

¹⁴¹ SUA Convention, *supra* note 112, art. 3(1).

¹⁴² As of December 31, 2004, 115 States have become party to the SUA Convention. See CONVENTION STATUS, *supra* note 113.

¹⁴³ According to statements made by Ms. Wan Napsiah Salleh, Malaysia's Undersecretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia is in the process of acceding to the SUA Convention. Wan Napsiah Salleh, *Strait of Malacca and the Challenges Ahead: A Malaysian Perspective*, Address at Maritime Institute of Malaysia's Conference on the Straits of Malacca 6-7 (Oct. 2004) at <http://www.mima.gov.my/mima/htmls/conferences/som04/papers/wan-napsiah.pdf> (last visited May 31, 2005).

the suppression of maritime terrorism, but the apprehension, conviction and punishment of those who commit such acts.¹⁴⁴ Only Article 13, which requires states to take "all practicable means" to prevent the use of their territories as bases for possible attacks, serves a preventative function.¹⁴⁵ Therefore, the SUA Convention is reactive as opposed to preventative in nature, and does little to provide for the creation of a regime to stop terrorism on the high seas or within the territorial waters of states.¹⁴⁶ Despite the international community's effort to address maritime terrorism, the SUA Convention is of limited applicability to preventing maritime terrorism in the Strait of Malacca.

The piracy laws of the UNCLOS and the anti-terrorism laws of SUA Convention do not adequately address the threat posed by maritime terrorism in the Strait of Malacca.¹⁴⁷ Since most attacks in the Strait occur in territorial waters, the piracy laws of the UNCLOS are inapplicable.¹⁴⁸ Similarly, the SUA Convention, even if applicable to the coastal states of Malaysia and Indonesia, provides for a legal regime to deal with perpetrators after an attack, not a regime that prevents them from perpetrating an attack in the first place.¹⁴⁹ While international piracy and current maritime terrorism laws do not provide an effective framework for addressing the threat of maritime terrorism, emerging international law regarding state responsibility for preventing terrorism may require the coastal states to take actions to address the issue.

V. EMERGING INTERNATIONAL TERRORISM LAW MAY IMPOSE LIABILITY ON THE COASTAL STATES IF THEY DO NOT TAKE ADDITIONAL ACTION TO SECURE THE STRAIT

Although existing international piracy and maritime terrorism laws do not provide an effective mechanism to address maritime terrorism in the Strait of Malacca,¹⁵⁰ emerging international terrorism law may impose

¹⁴⁴ SUA Convention, *supra* note 112, art. 10(1) (creating an extradite or prosecute obligation for party States).

¹⁴⁵ SUA Convention, *supra* note 112, art. 13. Article 13 requires states to cooperate in the prevention of offenses by: (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories; (b) exchanging information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3. *Id.*

¹⁴⁶ Mellor, *supra* note 131, at 379.

¹⁴⁷ See *supra* Part IV.A.

¹⁴⁸ UNCLOS, *supra* note 76, art. 101 (UNCLOS piracy laws apply only to the high seas).

¹⁴⁹ See *supra* Part IV.B.

¹⁵⁰ See discussion *supra* Part IV.

responsibility on the coastal states unless they take additional actions to address the security issue.¹⁵¹ Under principles of state responsibility, a state bears responsibility for its conduct that breaches its international obligations.¹⁵² States have a duty under customary international law to exercise due diligence in preventing injuries to foreigners within their territories.¹⁵³ Further, states have a duty not only to refrain from sponsoring and supporting terrorism, but also to take steps to prevent terrorism in accordance with United Nations Security Council Resolution 1373.¹⁵⁴ Given these international duties to prevent terrorism, Malaysia's and Indonesia's refusal to consider available options for improving security in the Strait arguably constitutes a breach of their international responsibilities to prevent terrorism. As such, Malaysia and Indonesia could be responsible for damages resulting from a maritime terrorism attack in the Strait.

A. *A State Can Be Responsible for Acts Committed by Non-State Actors If the State Breached Its Duty to Exercise Due Diligence in Preventing or Responding to the Act*

The law of state responsibility was most recently restated in the International Law Commission's ("ILC") Draft Articles on Responsibility of States for International Wrongful Acts ("Draft Articles").¹⁵⁵ Article 1 of the Draft Articles states: "Every internationally wrongful act of a State entails the international responsibility of that State."¹⁵⁶ According to Article 2, "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."¹⁵⁷ States found responsible for an internationally wrongful act may be liable for reparations to the injured state.¹⁵⁸

An act by an individual is attributable to the state if the individual is acting under the direction or control of that state,¹⁵⁹ the individual is

¹⁵¹ See *infra* Part V.B.

¹⁵² *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*].

¹⁵³ *Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 33 (May 24) [hereinafter *Diplomatic and Consular Staff*].

¹⁵⁴ S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/Res/1373 (2001) [hereinafter *Resolution 1373*].

¹⁵⁵ *Draft Articles*, *supra* note 152.

¹⁵⁶ *Id.* art. 1.

¹⁵⁷ *Id.* art. 2.

¹⁵⁸ *Id.* art. 34.

¹⁵⁹ *Id.* art. 8.

exercising elements of governmental authority in the absence or default of the official authorities,¹⁶⁰ or the state subsequently endorses the individual's actions.¹⁶¹ Acts or omissions of non-state actors are themselves generally not attributable;¹⁶² however, as discussed below, the state may incur responsibility if it failed to comply with its international obligations to prevent such acts or omissions.¹⁶³ With respect to terrorism, a state has an obligation under customary international law to exercise due diligence in protecting foreigners within its borders from acts of terrorism and specific obligations under U.N. Security Council Resolution 1373, including the obligation to take "the necessary" steps to prevent terrorism.¹⁶⁴ A state's failure to comply with these obligations to prevent terrorism can result in state responsibility if an attack occurs.

B. States Have a Duty to Exercise Due Diligence in Protecting Foreigners Within Their Borders

Under customary international law, a state has a duty to safeguard the security of aliens and their property in its territory.¹⁶⁵ A state not only has a duty to abstain from directly taking measures (through actions of its own organs) against the security of foreigners,¹⁶⁶ but it also has a duty to protect foreigners from harm by non-state actors.¹⁶⁷ These duties, however, are not absolute; rather, they are subject to a due diligence standard.¹⁶⁸ Due diligence requires that a state know of the need for action, have the means at its disposal to perform its obligations, and fail to comply with those obligations.¹⁶⁹ States that fail to exercise due diligence can be responsible for damages caused by non-state actors.¹⁷⁰

In *Corfu Channel*, the International Court of Justice ("ICJ") held Albania responsible for damage caused to two British ships that struck mines

¹⁶⁰ *Id.* art. 11.

¹⁶¹ *Id.* art. 9

¹⁶² OPPENHEIM'S INTERNATIONAL LAW § 166 (Robert Jennings & Sir Arthur Watts, eds. 9th ed. 1992).

¹⁶³ *Id.*

¹⁶⁴ Resolution 1373, *supra* note 154.

¹⁶⁵ *Id.*

¹⁶⁶ OPPENHEIM, *supra* note 162, § 165.

¹⁶⁷ *Id.* § 166.

¹⁶⁸ *Id.*

¹⁶⁹ Diplomatic and Consular Staff, *supra* note 153, at 34; Scott M. Malzahn, Comment, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 105 (2002).

¹⁷⁰ See *Corfu Channel* (Gr. Brit. v. Alb.) 1949 I.C.J. 4, 23 (Apr. 9) [hereinafter *Corfu Channel*].

while transiting Albanian waters.¹⁷¹ Although the ICJ did not find Albania responsible for laying the mines,¹⁷² the Court concluded that because Albania "constantly" kept watch over the channel and it was possible to observe the minelaying,¹⁷³ Albania knew, or should have known, about the mines.¹⁷⁴ Since Albania had knowledge of the mines, it had a duty to warn ships proceeding through the strait of the danger to which they were exposed.¹⁷⁵ Albania was responsible for the damage because it was aware of the danger and failed to take any actions to prevent the injury from occurring. Therefore, Albania's failure to warn the British ships about the danger constituted a breach of its duty to exercise due diligence.¹⁷⁶

Similarly, in the *Diplomatic and Consular Staff Case* the ICJ found Iran responsible, with regard to the first phase of events,¹⁷⁷ for the takeover of the United States Embassy in Tehran by a militant student organization.¹⁷⁸ The ICJ found that the students had no official status as recognized "agents" or organs of the Iranian State and had not acted on behalf of Iran.¹⁷⁹ Nevertheless, Iran was "fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part."¹⁸⁰ Although Iran had the means to protect the U.S. Embassy and remove the students, it failed to do so. Therefore, Iran's failure to respond to the situation constituted a breach of its international obligations, including its duty to exercise due diligence in protecting foreigners.¹⁸¹ Consequently, the ICJ found Iran responsible for the damages that resulted from the takeover.¹⁸²

Applying the above principles to the situation in the Strait of Malacca, Indonesia's and Malaysia's refusal to take additional steps to secure the Strait falls below the required due diligence standard. Given the sustained high piracy rates in the Strait,¹⁸³ Malaysia and Indonesia, just like Albania and Iran, are aware of the need for additional action on their part to improve security of the Strait. Further, given the offers of extra-regional assistance

¹⁷¹ *Id.* at 12-13.

¹⁷² *Id.* at 16-17.

¹⁷³ *Id.* at 20.

¹⁷⁴ *Id.* at 22.

¹⁷⁵ *Id.* at 22-23.

¹⁷⁶ *Id.* at 23. The coastal states' duty is partly codified in UNCLOS art. 24(2). UNCLOS, *supra* note 76.

¹⁷⁷ *Diplomatic and Consular Staff*, *supra* note 153, at 30.

¹⁷⁸ *Id.* at 29-33.

¹⁷⁹ *Id.* at 30.

¹⁸⁰ *Id.* at 33.

¹⁸¹ *Id.* at 33-34.

¹⁸² *Id.* at 42-43.

¹⁸³ IMB Press Release, *supra* note 5.

and the option of allowing for cross-border patrols, Malaysia and Indonesia have the means at their disposal to improve the security of the Strait.¹⁸⁴ Therefore, Malaysia's and Indonesia's refusal to implement such available steps is a breach of their duty to exercise due diligence to protect foreigners within the Strait of Malacca. As such, Malaysia and Indonesia could be responsible, under the principles of state responsibility, for damages resulting from a maritime terrorist attack.

C. *States Have a Duty to Take the "Necessary Steps" to Prevent International Terrorism under United Nations Security Council Resolution 1373*

Not only do states have a general duty under customary international law to exercise due diligence in protecting foreigners within their territories, but they also have specific duties to prevent terrorism.¹⁸⁵ It is well established that international law prohibits states from sponsoring or supporting terrorism.¹⁸⁶ Article 2, paragraph 4, of the U.N. Charter provides that states have a duty to refrain from making threats or employing force against a foreign state.¹⁸⁷ In 1992, in response to Libya's sponsorship of international terrorism, the United Nations Security Council passed Resolution 748, which states: "In accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every state has a duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts."¹⁸⁸ Indeed, this resolution is consistent with the ICJ decision in *Corfu Channel* in that a state cannot knowingly acquiesce to terrorist activity within its border without incurring responsibility.¹⁸⁹

¹⁸⁴ Admittedly, arrangements involving the use of extra-regional naval forces may infringe on the coastal states' sovereignty; however, this infringement is not so great as to outweigh the seriousness of the threat posed by piracy and maritime terrorism in the Strait. Furthermore, the international community has recognized that under certain circumstances state sovereignty must yield to other principles, such as the primacy of human rights. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited May 31, 2005).

¹⁸⁵ See *infra* Part V.C.

¹⁸⁶ *Id.*

¹⁸⁷ U.N. CHARTER art. 2, para. 4.

¹⁸⁸ S.C. Res. 748, U.N. SCOR, 42nd Sess., 3063rd mtg. at 52, U.N. Doc. S/RES/748 (1992).

¹⁸⁹ *Corfu Channel*, *supra* note 170, at 23.

The duty not to acquiesce knowingly to terrorist activity also requires that states refrain from harboring terrorists.¹⁹⁰ In response to the September 11, 2001, terrorist attacks, the United States launched an attack in October of that year against Afghanistan and its government, the Taliban.¹⁹¹ Underlying the justification for the attack was that a state that harbors terrorist organizations can incur responsibility if those organizations commit a terrorist attack.¹⁹² Given the lack of widespread criticism by the international community for the attack on Afghanistan, it appears that it is now accepted that a state can incur responsibility for harboring a terrorist organization.¹⁹³

Given terrorism's threat to international security, the duty to refrain from sponsoring, supporting, or acquiescing to terrorist activities has evolved into a duty to take steps to prevent terrorism from occurring.¹⁹⁴ In 2001 the United Nations Security Council, acting under its Chapter VII authority, passed Resolution 1373.¹⁹⁵ Resolution 1373 requires all states to freeze terrorists' assets, criminalize the financing of terrorism, bring terrorists to justice, refrain from providing support to terrorists, and ensure that all terrorist acts are established as serious criminal offenses in domestic law.¹⁹⁶ It also requires states to take "the necessary steps" to prevent terrorism.¹⁹⁷ Since Resolution 1373 was passed by the Security Council, it is binding on all member states.¹⁹⁸ States that do not take "the necessary steps" to prevent terrorism, as required by Resolution 1373, are in breach of their international obligations and bear responsibility for the resulting injuries.¹⁹⁹

Despite the requirement that states take "the necessary steps" to prevent terrorism, Malaysia and Indonesia have refused to take available steps to reduce the threat of maritime terrorism in the Strait. Given the limitations of the current patrol regime²⁰⁰ and the limited resources of

¹⁹⁰ See, e.g., S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., at 1-2, U.N. Doc. S/Res/1267 (1999) (condemning the Taliban for "sheltering and training" terrorists).

¹⁹¹ Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432 (Oct. 7, 2001).

¹⁹² See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 2 (2002).

¹⁹³ For a summary of reactions to the U.S. actions against Afghanistan see JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 942-48 (2002) (noting the U.N. statements following the U.S. air strikes concerned humanitarian issues).

¹⁹⁴ See, e.g., Resolution 1373, *supra* note 154 (requiring States to take positive actions to prevent terrorism).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ U.N. CHARTER art. 25.

¹⁹⁹ *Draft Articles, supra* note 152, art. 2.

²⁰⁰ See *supra* Part III.A.

Malaysia and Indonesia,²⁰¹ acceptance of extra-regional assistance and adoption of cross-border patrols are arguably not only necessary to prevent a maritime terrorism attack, but are also consistent with the proactive requirements and spirit of Resolution 1373. Therefore, Malaysia's and Indonesia's failure to take such additional steps falls short of the requirements of Resolution 1373 and places the two states in breach of their international obligation.

Although states are not generally responsible for actions by individuals, those actions may be attributed to the state if the state breached a duty to prevent such acts.²⁰² Malaysia's and Indonesia's refusal to consider available options to address the threat of maritime terrorism in the Strait of Malacca is a breach of their duties under international law to exercise due diligence in protecting foreigners within their borders and to take actions to prevent terrorism. As such, Malaysia and Indonesia could incur responsibility for a maritime terrorist attack in the Strait.

VI. TO AVOID STATE RESPONSIBILITY FOR A MARITIME TERRORISM ATTACK IN THE STRAIT OF MALACCA THE COASTAL STATES MUST ENTER INTO CROSS-BORDER AGREEMENTS AND ALLOW FOR EXTRA-REGIONAL PATROLS

Current efforts by the coastal states bordering the Strait of Malacca are insufficient to satisfy the duty imposed by international law to prevent terrorism. Therefore, they must take additional steps to avoid state responsibility for acts of maritime terrorism in the Strait. First, the coastal states should expand patrol efforts by forging cross-border agreements that would give limited rights to the three coastal states to enter each other's territorial waters. Second, the coastal states should permit extra-regional forces to patrol the Strait.

A. *Cross-Border Agreements Would Create a More Seamless and Effective Security Regime*

The current coordinated trilateral patrols do not allow naval vessels from one coastal state to enter the territorial sea of another coastal state even if they suspect a vessel is engaged in piracy or other acts of maritime violence.²⁰³ The existing tripartite agreement merely provides for increased

²⁰¹ *Id.*

²⁰² See *supra* Part V.A.

²⁰³ See *Coordinated Patrols*, *supra* note 90.

communication when such an incident arises.²⁰⁴ Unfortunately, this limitation provides an opportunity for a suspected criminal to escape from authorities by fleeing into the territorial sea of a neighboring coastal state.²⁰⁵

The coastal states could remedy this gap in the current tripartite regime by entering into standing agreements that would grant cross-border rights when pursuing suspect vessels. The United States has entered into similar "entry-to-investigate" agreements with several South American and Caribbean countries to facilitate counter-narcotics operations.²⁰⁶ If coastal states are unwilling to grant standing permission for cross-border pursuit, the states could agree to integrated patrols, where one official from each country would be on each patrol boat.²⁰⁷ These officials would be authorized to grant entry rights if necessary.²⁰⁸ Given the overlapping territorial waters, such agreements not only would be very practical in the Strait of Malacca, but would also produce a more seamless security regime.²⁰⁹

B. Extra-Regional Assistance Would Supplement the Resources of the Coastal States

While allowing for cross-border pursuit may be a necessary step, it is not adequate to prevent maritime violence in the Strait of Malacca. Even if cross-border pursuit is permitted, the trilateral efforts are limited by the individual capabilities of the three nations.²¹⁰ Therefore, the coastal states should permit extra-regional forces to patrol the Strait at least until the coastal states are able to secure the necessary resources to undertake adequate patrols. Given the sovereignty concerns, however, countries such as the United States and Japan, which have indicated interest in assisting with patrols, should consider using national coast guards carrying armed law enforcement persons instead of naval vessels.²¹¹ Extra-regional forces in addition to cross-border pursuit agreements would have an immediate effect

²⁰⁴ *Id.*

²⁰⁵ Malaysia, Indonesia Rule Out Joint Patrols, *supra* note 99 (quoting Captain PK Mukundan, of the IMB, as describing "a ridiculous situation . . . where a law enforcement agency gives chase to pirate boats, when it comes to the border territorial limits, the law enforcer stops, the pirate boat goes across and escapes").

²⁰⁶ Joseph E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?* 31 U. MIAMI INTER-AM. L. REV. 121, 134 (2000).

²⁰⁷ Such agreements are known as "shiprider agreements." The United States has entered into ship rider agreements with several Caribbean states for counter-narcotic efforts. *Id.*

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Coordinated Patrols*, *supra* note 90 (discussing current "hot" pursuit policies).

²¹⁰ See discussion *supra* Part III.

²¹¹ Sam Bateman, *Coast Guards: New Forces for Regional Order and Security*, 65 EAST-WEST CENTER 1 (Jan. 2003); Mitropoulos, *supra* note 11.

on security of the Strait: the combination would provide for immediate improvement of security capabilities and would allow for a more seamless patrol regime.

VII. CONCLUSION

The presence of local terrorist groups, the prevalence of piracy, and the importance of the regional maritime environment to international trade make Southeast Asian waters, and specifically the Strait of Malacca, a likely target for maritime terrorism. Despite the risk posed by maritime terrorism, current efforts by the coastal states have failed to adequately address the threat. By refusing to undertake steps that would improve security of the Strait, Indonesia and Malaysia have breached their duty under international law to prevent terrorism. As such, Indonesia and Malaysia could be responsible for damages caused by a maritime terrorist attack. If these states want to avoid responsibility for such an attack, they must take additional steps, including allowing extra-regional forces to patrol the Strait and permitting cross-border patrols. Such steps would ensure that the necessary forces are present in the Strait and that such forces have the ability to patrol the Strait without being hindered by border restrictions.

